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INTERNATIONAL CONTRACTUAL CLAIMS AND  
THEIR SETTLEMENT

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The program of this Conference was arranged in such a way as to call forth a discussion of the law to be administered by a Permanent International Court. It is believed that the experience in arbitration and judicial settlement which some of the speakers have had will make their papers as valuable as they were timely, and that the proceedings as a whole will be no mean contribution to the cause of judicial settlement.

TUNSTALL SMITH, Assistant Secretary,

The Preston, Baltimore, U. S. A.

# International Contractual Claims and Their Settlement\*

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By

EDWIN M. BORCHARD.

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Diplomatic protection is often invoked by citizens of one country in cases arising out of contracts entered into with citizens of another, or with a foreign government. With the constant growth in international intercourse and the exploitation of backward countries by foreign capital, this class of cases has assumed large proportions and has given rise to many perplexing and delicate diplomatic situations. The foreign offices of some of the more important governments have differentiated these claims from tortious claims arising out of direct injuries committed by an authority of the state against the person or property of their citizens, either by declining to interpose in behalf of their contracting citizens or else by exercising more than ordinary scrutiny over a cause of action having its origin in contract. Fundamentally it is the denial of justice which is the necessary condition for the interposition of a government on behalf of

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\*This monograph is in substance a chapter of a forthcoming book by the author, "The Diplomatic Protection of Citizens Abroad," to be published early in 1914 by the Banks Law Publishing Co., New York. It is issued with the publishers' permission.



its citizen prejudiced by breach of contract. As a general rule, before a claim originating in a contract can come within the category of a denial of justice it must have been submitted to the courts for such judicial determination as is provided by the local law or in the contract. Until such submission, the government's right of interposition has not yet accrued. The qualifications of this principle we shall consider hereafter.

There are three important classes of contract claims: first, those arising out of contracts concluded between individuals who are citizens of different countries; second, those arising out of contracts between the citizen and a foreign government; and third, claims arising out of the unpaid bonds of a government held by the citizen of another. The failure of some publicists to distinguish these classes clearly in their discussion of the subject, especially the failure to distinguish the second from the third class, has brought about some confusion. When they state, as many of them do, that on principle there can be no intervention in claims arising out of contract, they really mean to confine their assertion to the case of claims arising out of unpaid bonds and *not* contracts in general. This distinction, as we shall see hereafter, is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign government than there is in the case of breaches of concession and similar contracts.

Hall fails properly to note the distinction between contract and other claims. He recognizes that there is a difference in the practice of governments in supporting claims arising out of a default of a foreign state in paying the interest or principal of loans made to it, and the complaints of persons sustaining injury in other ways. He admits that in the

former case governments generally decline interposition, whereas in the latter it is a matter of expediency whether in the particular case their right of interposition shall be exercised. After giving the reasons why public loans should not become a cause of international intervention, he states that, fundamentally,

“there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible.”<sup>1</sup>

While the statement is technically correct, it is apt to be misleading, inasmuch as it treats ordinary contract claims and those arising out of tort as forming one class, whereas there is an essential difference between them. This consists in the fact that in the case of contractual claims the active notice taken by the state of the wrong done its citizen is deferred until he has exhausted his local judicial remedies and a denial of justice is established, whereas in claims arising out of tort, if chargeable to a government authority, interposition is generally immediate; and in the further fact that wider discretion is exercised by the protecting state in the enforcement of contractual claims than of those purely tortious in origin.

Westlake is one of the few writers who properly distinguish the case of ordinary contract claims—for example, those arising out of supplies furnished the government or out of concession contracts concluded between a citizen and a

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<sup>1</sup> Hall, *International Law* (6th ed.), 275-276. See also Findlay, commissioner U. S.-Venezuelan commission of Dec. 5, 1885, who considered the difference one in degree only. He believed that a contractual claim for building a public work and one founded on non-payment of a public debt are the same, both being voluntary engagements. *Opinions of the commission* (Washington, Gibson Bros., 1890), 335, *Moore's Arb.*, 3650.



foreign government—and the case of unpaid bonds which are part of a public loan.

In the case of ordinary contract claims, he says,

“there is a petition of right, a court of claims, or an appropriate administrative tribunal before which to go. The case is not essentially different from any other arising between man and man. The foreigner who has contracted with the government has not elected to place himself at its mercy, and the rule of equal treatment with nationals requires that he shall have the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the other rule of protecting subjects against a flagrant denial of justice also comes in. But public loans are contracted by acts of a legislative nature, and when their terms are afterwards modified to the disadvantage of the bondholders this is done by other acts of a legislative nature, which are not questionable by any proceeding in the country. If therefore the rule of equal treatment with nationals be looked to, the foreign bondholder has no case unless he is discriminated against. And if the rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of the inability of the country to pay more—a foreign government is scarcely able to determine whether or how far that plea is true—supposing it to be true, the provisions which all legislations contain for the relief of insolvent debtors prove that honest inability to pay is regarded as a title to consideration—and the holder of a bond enforceable only through the intervention of his government is trying, when he seeks that intervention, to exercise a different right from that of a person whose complaint is the gross defect of a remedial process which by general understanding ought to exist and be effective.”<sup>2</sup>

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<sup>2</sup> Westlake, *International Law*, vol. I (2nd ed.), 332-333.

*Contracts between Individuals.*

The first class of cases, contracts between individuals, can give rise only to an action in the courts for breach of contract. The government of the foreigner is in no wise concerned unless the local courts deny or unduly delay justice, in which event the government's right of interposition rests on the denial of justice alone and disregards the fact that the claim had its origin in a contract. This rule has generally been followed by the governments of contracting citizens, and has been applied by international commissions.<sup>3</sup>

*Contracts between Citizen and Foreign Government.*

A more doubtful case arises where the contract has been concluded between the citizen and the foreign government. We shall not here discuss the question of unpaid bonds, for this is a distinct branch of the subject, although some writers do not observe it. The contracts now in question are such as are made with the foreign government for the supply of material, for the execution of public works, and for the exercise of concessions of various kinds. Here again the general rule followed by the United States, although not by all other governments, is that a contract claim can not give rise to the diplomatic interposition of the government unless, after an exhaustion of local remedies, there has been a denial of justice, or some flagrant violation of international law. The use of good offices is, however, usually sanctioned. While the rule is fairly clear, its application and

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<sup>3</sup> Smith (U. S.) *v.* Mexico, Act of Congress, Mar. 3, 1849, Moore's Arb., 3456; Rowland (U. S.) *v.* Mexico, Mar. 3, 1849, Moore's Arb., 3458; Hayes (U. S.) *v.* Mexico, Mar. 3, 1849, Moore's Arb., 3456; Chase (U. S.) *v.* Mexico, Moore's Arb., 3469-70; La Guaira Light & Power Co. (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston I, 182.



its exceptions are vague, due principally to the fact that the intervening government interprets for itself what is a denial of justice and frequently concludes that harsh treatment of its contracting citizen by the foreign government constitutes a tortious act which takes the case out of the ordinary rule. Broadly speaking, we might state the rule as follows: Diplomatic interposition will not lie for the natural or anticipated consequences of the contractual relation, but only for arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law.<sup>4</sup>

There are several reasons why governments are and should be less zealous in pressing the claims of their citizens arising out of breach of contract than those arising out of some tortious act. The first reason is that the citizen entering into a contract does so voluntarily and takes into account the probabilities and possibilities of performance by the foreign government. He has in contemplation all the ordinary risks which attend the execution of the contract. In the second place, by going abroad, he submits impliedly to the local law and the local judicial system. The contract or the law provides remedies for breach of contract. These he must pursue before his own government can become interested in his case. In the third place, practically every civilized state may be sued for breach of contract. Even the United States, which renders itself less amenable to suit at the hands of injured individuals than perhaps any other country, recognizes its liability for illegal breaches of con-

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<sup>4</sup> F. de Martens, in his essay "Par la justice vers la paix" (pp. 30-31), supports the rule of non-interference by the government until the claimant has appealed to the local courts and justice has been denied. Even then he suggests a preliminary judicial examination into the justice of the claim by the government of the claimant. See also Martens' *Traité de droit international*, vol. I, 446-447. See also Fiore, *P. Nouveau droit int. public* (Paris, 1885, Antoine's trans.), § 651; Lomonaco, *Diritto internazionale pubblico* (Napoli, 1905), 218-219.



tract.<sup>5</sup> In England, a petition of right is rarely refused; in the United States, the Court of Claims or a similar body in the states has jurisdiction; in France and some other countries, the Council of State or some administrative body is the proper forum for suits against the State; in Latin America the Supreme Court is generally given jurisdiction.

The exceptions to this requirement of exhausting local remedies occur first, where the local judicial organization is so corrupt, or the possibility of local remedy so remote, that it would be folly to compel a citizen to submit his cause of action to local courts. The fact that the protecting government determines for itself the existence of these qualifying conditions renders the application of the rule uncertain. Secondly, where the breach is one not within the contemplation of the contracting parties, but partakes of the nature of an arbitrary tort, the protecting government will relieve its citizen from the ordinary rule of submission to local courts. The position of the injured individual and the protecting government is the same as in cases of ordinary tortious acts of the defendant government and justifies interposition.

The early publicists seem to have justified reprisals by a government for default of obligations due its citizen on the part of another government. Grotius appears to have sanctioned reprisals for the collection of debts due to subjects from a foreign power notwithstanding the claim to be thus satisfied was submitted to the courts of the government in default and by them pronounced unfounded.<sup>6</sup> Vattel similarly justified hostile action to enforce contracts concluded between a citizen and a foreign government. But Vattel ad-

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<sup>5</sup> Revised Statutes, § 1059, par. 1; § 1060; § 1068; Act of March 3, 1887 (Tucker Act), 24 Stat. L., 505, § 1.

<sup>6</sup> Grotius, *De jure belli ac pacis*, 3, 2, 5; *cf.* 1, 5, 2 and 2, 25, 1.

mits that before the claimant nation proceeds to such extremities (reprisals) it must be able to show that it

“has ineffectually demanded justice, or at least that [the claimant] has every reason to think it would be vain . . . to demand it.”<sup>7</sup>

From that time on, the conviction has gained ground that an attempt to exhaust local justice must be shown before diplomatic pressure or hostile action is warranted. Modern writers generally agree that where the citizen has at his disposal the legal means of asserting his rights and obtaining reparation of his injury by judicial proceedings, the interposition of his government is unjustified, for

“to secure by diplomacy what the individual might secure judicially is to be deemed highly reprehensible.”<sup>8</sup>

As we shall see, contractual claims are among the first causes of complaint now largely removed from the field of *armed* conflict, through the adoption by the Second Hague Conference and the general ratification of the convention for the limitation of force to recover contract debts.

Coming now to the practice of governments we can not say that the countries of continental Europe make any substantial distinction between claims arising out of contract and those arising out of other acts.<sup>9</sup> The United States,

<sup>7</sup> Vattel, *Law of Nations* (Chitty-Ingraham edition, Phila., 1855), Bk. II, Ch. 14, § 18, 214-216; Ch. 18, §§ 343, 347, 354. See also Wheaton, *International Law* (Lawrence's edition, 1863), 510.

<sup>8</sup> Fiore, *P. Nouveau droit international public* (Antoine's trans.), vol. I, § 651. Martens, *Traité de droit international*, 446.

<sup>9</sup> Germany, Italy and France have at times intervened diplomatically in favor of their subjects in cases arising out of contract, without any question as to the propriety of such action. Germany's and Italy's attitude was shown in the action against Venezuela in 1902. See Dulong in 38 *Amer. Law Rev.*, 650, and Brook in 30 *Law Mag. & Rev.*, 165. See also case of Kronsberg, a German engineer, against Roumania in 1871, Tchernoff, *Protection des nationaux à l'étranger*, 188; Martens' *Traité*, I, 70. See the French action against the Dominican Republic, 1894, *For. Rel.*, 1895, I, 235-243, 397-402.



however, and at times Great Britain, have limited their protection considerably in the case of ordinary contract claims. The fact that the citizen entered voluntarily into the contract seems to have been a determining factor in the policy of the United States not to interpose diplomatically in behalf of its citizens prejudiced through breach of a contract concluded by them with a foreign government. John Quincy Adams' statement as Secretary of State has been quoted frequently by his successors in the Department of State. Adams' ruling was as follows:

"With regard to the contracts of an individual born in one country with the government of another, most especially when the individual contracting is domiciliated in the country with whose government he contracts, and formed the contract voluntarily, for his own private emolument and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the government of his nativity to espouse his claim, this government having no right to compel that with which he voluntarily contracted to the performance of that contract."<sup>10</sup>

Mr. Marcy in 1856 made the following apt statement of the rule of the Department of State:

"The government of the United States is not bound to interfere to secure the fulfillment of contracts made between their citizens and foreign governments, it being presumed that before entering into such contracts the disposition and ability of the foreign power to perform its obligations was examined, and the risk of failure taken into consideration."<sup>11</sup>

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<sup>10</sup> John Quincy Adams, Secretary of State, to Mr. Salmon (April 29, 1823), *Am. St. Pap., For. Rel.*, vol. 5, 403, quoted in Wharton II, 654, Moore's Dig., VI, 708, and notes there cited. See also the Landreau case, Sec'y of State Bayard to Mr. Cowie (June 15, 1885), Moore's Dig., VI, 715; and the Fiedler case, Mr. Bayard, Sec'y of State, to Mr. Jarvis (Mar. 22, 1886), Moore's Dig., VI, 715.

<sup>11</sup> Mr. Marcy, Sec'y of State, to Mr. Fowler (July 17, 1856), Wharton II, 655.



While diplomatic interposition or pressure is declined, the use of friendly good offices by the diplomatic representatives of the United States abroad is authorized. Secretary Fish expressed as follows the practice of the Department in this respect:

"Our long-settled policy and practice has been to decline the formal intervention of the government except in cases of wrong and injury to persons and property, such as the common law denominates *torts* and regards as inflicted by force, and not the results of voluntary engagements or contracts.

"In cases founded upon contract the practice of this government is to confine itself to allowing its minister to exert his friendly good offices in recommending the claim to the equitable consideration of the debtor without committing his own government to any ulterior proceedings."<sup>12</sup>

What is meant by "good offices" and the extent to which they may be exerted has on several occasions been construed by secretaries of state. Mr. Fish defined the use of "good offices" as a direction to a diplomatic agent

"to investigate the subject, and if [he] shall find the facts as represented [he] will seek an interview with the minister for foreign affairs and request such explanations as it may be in his power to afford."<sup>13</sup>

Good offices are in the nature of unofficial personal recommendations and are not tendered officially, although apparently the government may authorize or direct a diplomatic representative to extend them. Perhaps the best statement

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<sup>12</sup> Mr. Fish, Sec'y of State, to Mr. Muller (May 16, 1871), Wharton II, 656, Moore's Dig., VI, 710. See the long list of cases cited by Wharton (II, 655) and by Moore (VI, 705-707) in support of the rule that "it is not usual for the Government of the United States to interfere, except by its good offices, for the prosecution of claims founded on contracts with foreign governments."

<sup>13</sup> Mr. Fish, Sec'y of State, to Mr. Osborn (Mar. 4, 1876), Wharton II, 658, Moore's Dig., VI, 711.

of the practice of the United States in the matter of contract claims was made by Secretary Bayard in 1885 :

"It is not necessary to remind you that an appeal by one sovereign on behalf of a subject to obtain from another sovereign the payment of a debt alleged to be due such subject is the exercise of a very delicate and peculiar prerogative, which, by principles definitely settled in this Department, is placed under the following limitations :

"1. All that our government undertakes, when the claim is merely contractual, is to interpose its good offices ; in other words, to ask the attention of the foreign sovereign to the claim ; and this is only done when the claim is one susceptible of strong and clear proof.

"2. If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such a refusal or denial, a contractual claim for the repudiation of which there is by the law of nations no redress. \* \* \*

"3. When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the government of the United States remands all claims held abroad, as well as at home, to the action of that court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary.

"4. When this Department has been appealed to for diplomatic intervention of this class, and this intervention is refused, this refusal is regarded as final unless after-discovered evidence be presented which, under the ordinary rules applied by the courts in motions for a new trial, ought to change the result, or unless fraud be shown in the concoction of the decision."<sup>14</sup>

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<sup>14</sup> Mr. Bayard, Sec'y of State, to Mr. Bispham (June 24, 1885), Wharton II, 656, Moore's Dig., VI, 716.



Even good offices will, however, be refused

“when the debt was of a speculative character, or when it was incurred to aid the debtor government to make war on a country with which the United States was at peace.”<sup>15</sup>

From this we may infer that the State Department takes some official interest in the extension of good offices.

The United States will not promise protection in advance to secure the execution of a contract between a citizen and a foreign government. The American-China Development Company in entering upon contracts with China requested such advance protection and alleged that the English investors in their enterprise would receive such guaranty from the British foreign office. Secretary of State Day gave as the reason for his unwillingness to extend such a guaranty as the British government was said to have extended, that the British Crown, exercising the executive power in Great Britain, possesses both the war-making and the treaty-making power, and is therefore authorized, in international relations, to give guarantees and enter into engagements which the Executive of the United States would not alone be competent to assume.<sup>16</sup>

Secretary Marcy in 1855 gave a somewhat similar explanation for the unwillingness of the United States to interfere officially in a case of alleged breach by a foreign government of a contract with citizens of the United States.<sup>17</sup> The possibility of Congress declining to support the action of the Executive does not, however, appear to have been as prom-

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<sup>15</sup> Mr. Seward, Sec'y of State, to Messrs. Leavitt & Co. (May 6, 1868), Wharton II, 656, Moore's Dig., VI, 710.

<sup>16</sup> Sec'y of State Day to Messrs. Cary & Whitridge (Aug. 24, 1898), in the case of the American-China Development Co., Moore's Dig., VI, 288.

<sup>17</sup> Mr. Marcy, Sec'y of State, to Mr. Clay, Minister to Peru (May 24, 1855), Moore's Dig., VI, 709.



inently in the minds of other secretaries of state in dealing with international claims. While the Department of State will rarely protest in advance against a proposed law of a foreign country interfering merely with contractual rights of American citizens, there have been occasions where such action was taken.<sup>18</sup>

The general belief that Great Britain does not in practice interfere in claims arising out of contract, is erroneously based upon the frequently quoted circular of Lord Palmerston, Secretary of State for Foreign Affairs, directed in 1848 to the British representatives in foreign states.<sup>19</sup> Palmerston declared that while the government had the *right* to intervene, it was merely a question of discretion with the British government whether the pecuniary claims of subjects should be taken up or not by diplomatic negotiation, and "the decision of that question of discretion turns entirely upon British and domestic considerations."<sup>20</sup> This language is broad enough indeed to cover any class of claim, but it must be understood that Palmerston's ruling was made with reference to claims arising out of unpaid bonds of foreign states held by British subjects, a case in which intervention is for various reasons, as we shall show, even less justifiable than in the case of ordinary contracts.

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<sup>18</sup> Mr. Webster, Sec'y of State, to Mr. Letcher (August 24, 1850), protesting against any violation by decree of the Tehuantepec concession, adding that this would be regarded as a national grievance. Sen. Doc. 97, 32nd Cong., 1st Sess.

<sup>19</sup> The instruction in full is printed in Phillimore on International Law (3rd ed., London, 1882), vol. 2, 9-11.

<sup>20</sup> In fact, Great Britain has often interposed to redress breaches of private contract. See, for example, the intervention in Bolivia in 1853, Lord Clarendon to Mr. Lloyd, 56 St. Pap., 1003, and the criticism of Great Britain's action by Baty, Int. Law, p. 127. Great Britain freely extends good offices. See, for example, case of *Dixon v. Portugal*, 75 St. Pap., 1196.

In applying the rule of refusing diplomatic interposition on contract claims, the United States has always been careful to limit its strict interpretation to cases entirely free from the qualifying factors of a denial of justice or other tortious element. If in any respect a denial of justice could be discerned in the case, or if any arbitrary act or confiscatory breach of the contract had taken place, the rule has been considered as no longer applying. A brief enumeration of these exceptions to the rule may be of interest.

1. The United States has on several occasions insisted that its citizens entering into foreign contracts shall have free and fair access to the courts and that the courts shall be so organized that the dispensing of justice may be presumed. Secretary of State Evarts once said that when a government does not hold itself amenable to judicial suit by foreign claimants on contracts made with it, their claims may be held to form an exception to the general rule as to contracts,<sup>21</sup> and in a subsequent case in Hayti, the Lazare case, Mr. Evarts added:

“the Government of the United States will insist on fair and impartial examination and adjudication by Hayti, without discrimination as to nationality, of a contractual claim of a citizen of the United States against Hayti.”<sup>22</sup>

Mr. Bayard in stating the general rule of refusal to press contract claims excepted the case of discrimination against a citizen by the debtor government and a denial of a judicial remedy against it.<sup>23</sup> In the celebrated Idler case the fact

<sup>21</sup> Mr. Evarts to Mr. Gibbs (Oct. 31, 1877), Wharton II, 662. This statement occurs in Mr. Evarts' opinion in the case of *Sparrow v. Peru*, Moore's Dig., VI, 720. See also For. Rel., 1895-6, Pt. II, 1036-1055.

<sup>22</sup> Mr. Evarts to Mr. Langston, Minister to Hayti (Dec. 13, 1877), Moore's Dig., VI, 724. For a history of the Lazare case, see Moore's Arb., 1749 *et seq.*

<sup>23</sup> Mr. Bayard, Sec'y of State, to Mr. Hall, Minister to Central America (Mar. 27, 1888), For. Rel., 1888, Pt. I, 136. See also Moore's Dig., VI, 727.



that Venezuela had illegally invoked the remedy of *restitutio in integrum* and by executive action had arbitrarily changed the personnel of the court and district attorney for that particular case was held by the mixed commission under the convention of Dec. 5, 1885, to have been a denial of justice and to warrant an award.<sup>24</sup>

2. Cases have frequently occurred in which the contracts of citizens of the United States with foreign governments were arbitrarily annulled by the contracting government without recourse to a judicial determination of the contract or of the legitimacy of its act. An act of this kind has generally been held by the Department of State to be a confiscatory breach of the contract and to warrant diplomatic interposition as in cases of tort. Any weakening of the judicial remedy of the citizen has been held equally to relieve the government from the ordinary rule of non-intervention in contract cases. The rule in such cases has perhaps been best stated by Lewis Cass, when Secretary of State, as follows:

“It is quite true, for example, that under ordinary circumstances when citizens of the United States go to a foreign country they go with an implied understanding that they are to obey its laws, and submit themselves, in good faith, to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign government is to be made a party to this business or these contracts, or will undertake to determine any disputes to which they may give rise. The case, however, is very much changed when no impartial tribunals can be said to exist in a foreign country, or when they have been arbitrarily controlled by the government to the injury of our citizens. So, also, the case is widely different when the foreign government be-

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<sup>24</sup> *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb., 3517.



comes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice."<sup>25</sup>

In a previous communication to Mr. Lamar, Minister to Central America, Mr. Cass stated:

"What the United States demand is that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen or shall arise respecting the fidelity of their execution, no declaration of forfeiture, either past or to come, shall possess any binding force unless pronounced in conformity with the provisions of the contract, if there are any; or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just and that the decision ought to be submitted to."<sup>26</sup>

The forcible deprivation of the property and franchises of a citizen of the United States without due process of law and a fair trial is considered as a tort and the claim will be pressed on that ground regardless of its contractual origin.

Madison, at an early date in our history, distinguished between "compulsory measures" practised upon United States citizens and "voluntary contracts," the possible results of which may be presumed to have been in the contemplation of the parties.<sup>27</sup>

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<sup>25</sup> Mr. Cass, Sec'y of State, to Mr. Dimitry (May 3, 1860), Moore's Dig., VI, 287.

<sup>26</sup> Mr. Cass, Sec'y of State, to Mr. Lamar, Minister to Central America (July 25, 1858), Wharton II, 661, Moore's Dig., VI, 723-724. See also Mr. Cass to Mr. Jerez (May 5, 1859), Moore's Dig., VI, 724; Mr. Bayard, Sec'y of State, to Mr. Scott, Minister to Venezuela (June 23, 1887), Moore's Dig., VI, 725.

<sup>27</sup> Mr. Madison, Sec'y of State, to Mr. Livingston (Oct. 27, 1803), Moore's Dig., VI, 707.

Perhaps the most zealous interposition on the part of the United States has been in cases where the confiscatory act of the foreign government consisted in the arbitrary annulment of the entire contract or of some of its essential provisions without a resort to the courts.<sup>28</sup>

Numerous other cases have occurred, particularly in Venezuela, where the arbitrary annulment of a contract by the Executive without appeal to the courts was held to justify diplomatic intervention and to render the government liable.<sup>29</sup> Nor has the presence of the Calvo clause in the contract, by which the alien contractor undertakes to make the local courts his final forum and to forego his right to claim the diplomatic protection of his own government, denied to the claimant's government the right to interpose in his behalf where there has been an arbitrary annulment of the contract

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<sup>28</sup> Delagoa Bay Railroad case, *McMurdo (U. S.) v. Portugal*, For. Rel., 1900, 903; 1902, 848-852. See also Moore's Dig., VI, 727-728, Moore's Arb., 1865-1899.

For the El Triunfo case, *Salvador Commercial Co. (U. S.) v. Salvador*, see For. Rel., 1902, 838-880, and the learned arguments of Hon. W. L. Penfield, Solicitor of the Department of State, 839-848. See also the legal opinion (Gutachten) of Professor Ludwig von Bar, given at the request of the Government of Salvador, which is printed under the title "Eine internationale Rechtsstreitigkeit," in Jhering's Jahrbücher, vol. 45, 161-210.

See also the case of *May (U. S.) v. Guatemala*, For. Rel., 1900, 648-674, Jenner Arbitrator, Moore's Dig., VI, 730. In *Oliva (Italy) v. Venezuela*, Feb. 13, May 7, 1903, it was held that claimant's unlawful expulsion, preventing compliance with the contract, was an arbitrary act, justifying damages for money expended and time lost. Ralston I, 771. See also *Paquet (Belgium) v. Venezuela*, March 7, 1903, Ralston I, 269; *Aboilard (France) v. Hayti*, June 15, 1904, Arbitrators Vignaud, Renault and Solon Menos, Rev. gen. de droit int. pub., vol. 12 (1905), Documents, 12, 13-17; *Punchard et al., Antioquia Railway (Gt. Brit.) v. Colombia*, July 31, 1896, La Fontaine Pasicrisie Internationale, 544; *Cedroni (Italy) v. Guatemala*, March 18, 1898; La Fontaine, op. cit., 606; the concessions in the last case were gratuitous.

<sup>29</sup> Senate Document 413, 60th Cong., 1st Sess., p. 105. *Rudloff (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston I, 187; *Kunhardt (U. S.) v. Venezuela*, Morris's Rep., Senate Document 317, 58th Cong., 2nd Sess., 189-190; *Selwyn (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston I, 322; *North & South America Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb., 2938, and final settlement in For. Rel., 1895, I, 85-86; *Milligan (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb., 1643.



by the local government. This conclusion has been based on one of several grounds. In some cases the arbitrary action of the government was held to be a tort, thus rendering the construction of the contract unnecessary. In other cases the arbitrary action and the failure of the government to secure a judicial construction in first instance was held to relieve the claimant from his own stipulation to resort to the local courts and forego the diplomatic protection of his government. In any event, it was held that the citizen could not contract away the right of his own government to interpose diplomatically in his behalf, the right of his government to intervene being superior to the right or competency of the individual to contract it away.<sup>30</sup>

3. Various acts of foreign governments have been construed as sufficiently arbitrary to warrant the United States in intervening in contract claims or to authorize international commissions to award indemnities. Thus the proposed depreciation by Hayti of the value of certain bonds issued to American citizens for work and materials was held to justify the United States in protesting and eventually intervening.<sup>31</sup> Lord Salisbury,<sup>32</sup> the British foreign secretary, protested likewise against a proposed act of Peru tending to weaken certain security hypothecated to the holders of Peruvian bonds. So the diversion of the security of certain rev-

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<sup>30</sup> *Martini (U. S.) v. Venezuela*, Feb. 13, 1903, *Ralston I*, 819; *Selwyn (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston I*, 322; *Milligan (U. S.) v. Peru*, Dec. 4, 1868, *Moore's Arb.*, 1643; *Delagoa Bay Railway case, McMurdo (U. S. and Great Britain) v. Portugal*, June 13, 1891, *Moore's Arb.*, 1865; see also *International Law Association*, 24th Rep. (1908), address of Jackson H. Ralston, pp. 192, 193; *Mr. Bayard to Mr. Scott, Minister to Venezuela* (June 23, 1887), *Moore's Dig.*, VI, 725.

<sup>31</sup> *Mr. Sherman, Sec'y of State, to Mr. Powell, Minister to Hayti* (Oct. 26, 1897), *Moore's Dig.*, VI, 729.

<sup>32</sup> *Lord Salisbury, British Foreign Sec'y, to Señor Pividal, Peruvian Minister* (Nov. 26, 1879), quoted from *Parliamentary Papers in Moore's Dig.*, VI, 724.



enue pledged to the payment of the claims of citizens of the United States, even when contractual in origin, has been held to warrant interposition.<sup>33</sup>

4. The United States has on several occasions intervened to secure the payment to one of its citizens of the damages arising through breach of contract by a foreign government where such breach involved an element of tort. Thus the seizure by the President of the Dominican Republic of the Ozama bridge brought about the diplomatic interposition of the United States in behalf of Thurston, an American engineer who had built the bridge under contract with that government.<sup>34</sup> The most recent case of this character was the arbitrary expulsion of Treasurer-General Shuster from Persia, in which case the Department of State took an interest and by its firm position helped to secure the full payment of salary for the entire unexpired time of the contract.<sup>35</sup>

5. The equitable character of the claim has at times induced the Department of State to recede from its rigorous position of declining interposition where the claim originated in a contract.<sup>36</sup>

Equitable considerations alone, however, have rarely induced any stronger action than the use of good offices.

6. Where a definite arrangement for the liquidation of the claim has been made between the alien and the government,

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<sup>33</sup> *Walter (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb., 3567-3568; *Moses (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3465.

<sup>34</sup> Ozama Bridge claim, *Thurston (U. S.) v. Dominican Republic*, For. Rel., 1898, 274-291.

<sup>35</sup> Article of Clement L. Bouvé, *Russia's Liability in Tort for Persia's Breach of Contract*, citing note of Secretary of State Knox of Dec. 1, 1911, *American Journal of International Law*, vol. 6, 396-407.

<sup>36</sup> Letter of Evarts, Sec'y of State, to Sir E. Thornton (May 2, 1879), Wharton's Dig., II, 658; see also correspondence between Mr. Fish and Mr. Thomas in 1874 in the Landreau case *v. Peru*, Moore's Dig., VI, 714-715.

it will generally be enforced by diplomatic pressure, notwithstanding its contractual origin.<sup>37</sup>

*Arbitration.*

7. Whatever hesitation there may have been on the part of the Executive to interpose diplomatically in behalf of citizens injured through the breach of a contract concluded with a foreign government, the Department of State has generally been willing to submit contract claims to the adjudication of international commissions, and these commissions have in general exercised jurisdiction over contract claims as over other claims.<sup>38</sup> In instructions given by Mr. Pickering on October 22, 1799, to the American plenipotentiaries to France, the envoys were directed to secure the adjustment of "all claims" of citizens of the United States against that government, and among these there were expressly enumerated the "sums due" to American citizens by contracts with the French Government, or its agents.<sup>39</sup>

<sup>37</sup> Lord John Russell, British Foreign Sec'y, to Sir C. L. Wyke (Mar. 30, 1861), 52 St. Pap., 238, quoted also in Moore's Dig., VI, 719; Claim of Waring Brothers, railroad contractors (Gt. Brit.) v. Brazil, in which Great Britain insisted on the carrying out by Brazil of a decree which appropriated an indemnity for the loss sustained by Waring Brothers due to the government rescinding the contract. Moore's Dig., VI, 720-721, For. Rel., 1887, 54, 55. The French claims against Venezuela liquidated under the convention of June 29, 1864, Moore's Dig., VI, 711-712. See also the settlement of the claim of W. R. Grace (U. S.) v. Peru, in which the failure of the government to carry out a judgment against it was construed as a denial of justice warranting diplomatic intervention. Mr. Neill to Mr. Hay, Sec'y of State (Nov. 19, 1903), For. Rel., 1904, 678.

<sup>38</sup> Contract claims have been submitted to general mixed commissions dealing with general claims (as, for example, the U. S.-Mexican commissions of 1839 and 1868, the U. S.-Venezuelan commissions of 1885 and 1903 and many others) and to special commissions instituted to decide single claims (as, for example, the claim of Metzger & Co. (U. S.) v. Hayti, October 18, 1899, Day, Arbitrator, For. Rel., 1901, 262-276, and that of the San Domingo Improvement Co. (U. S.) v. Dominican Republic, Jan. 31, 1903, For. Rel. 1904, 270. General mixed commissions have assumed jurisdiction of contract claims under the customary inclusive terms of the protocol "all claims," and even "claims" arising out of "injury to person or property of citizens."

<sup>39</sup> Am. St. Pap., For. Rel., vol. 2, 242, 301, 303; see also Moore's Dig., VI, 707-708.



By the convention between the two countries of April 30, 1803, for the "payment of sums due" by France to citizens of the United States, provision was made for the satisfaction of "debts."<sup>40</sup> In the treaty of February 22, 1819, between the United States and Spain by which either government renounced "all claims" of its citizens or subjects against the other government, Mr. Adams, Secretary of State, considered that contract claims had been included among those renounced.<sup>41</sup> Mr. Adams added that there was no doubt of the right of the government to include such claims in the provisions of the treaty.

Practically all international commissions, where the terms of submission in the protocol could be construed as sufficiently broad, have exercised jurisdiction over contract claims, for example, the United States-Spanish Commission of February 22, 1819, the three Mexican commissions of April 11, 1839, of March 3, 1849, (Domestic Commission), of July 4, 1868, the United States-British Commission of February 8, 1853, and August 18, 1910, the United States-Peruvian Commission of January 12, 1863, the United States-French Commission of January 15, 1880, the United States-Venezuelan Commission of December 5, 1885, the Venezuelan Commission of 1903 sitting at Caracas, and many others.<sup>42</sup> A conflict arose in the commission of July

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<sup>40</sup> Moore's Dig., VI, 708.

<sup>41</sup> Moore's Dig., VI, 717-718; Moore's Arb., 4502-4505.

<sup>42</sup> See Moore's Dig., VI, 718; Ralston I, Report of Venezuelan Commissions; Moore's Arb., 3425-3590; J. Hubley Ashton, agent of the United States before the Mixed Commission with Mexico of July 4, 1868, in an elaborate argument in the case of the State Bank of Hartford (No. 535) and other similar cases, opposing a motion to dismiss for want of jurisdiction over contract claims, analyzed minutely the practice of the United States and the jurisdiction of international commissions in the matter of contract claims, especially under a protocol submitting "all claims . . . arising out of injuries to . . . person or property." He cited decisions of municipal courts and international



4, 1868, due to the difficulty of reconciling vacillating opinions with proper judicial action. Commissioners Wadsworth, Palacio and Umpire Lieber (though the latter was not always consistent) had allowed claims on contracts concluded between citizens of the United States and agents of Mexico for the furnishing of arms, munitions, and other material to the Mexican Government, on the ground that the failure to pay for such goods constituted an "injury" to the "property" of an American citizen under the terms of the protocol. The Mexican Commissioner, Palacio, while adhering to the view of his colleagues that contract claims were within the jurisdiction of the commission, believed that a demand and refusal of payment was a condition precedent to the allowance of the claim. Subsequently upon the death of Dr. Lieber and the resignation of Commissioner Palacio, Sir Edward Thornton became umpire and Señor Zamacona the Mexican Commissioner. Thereupon a different view was taken as to the jurisdiction of the commission over contract claims. Sir Edward Thornton considered that he ought to follow the practice of the Executive of exercising discretion in assuming jurisdiction of contract claims, for which reason, while admitting the jurisdiction of the commission over contract claims, he declined to allow such as were based upon voluntary contract, in the absence of clear proof of the contract and proof that gross injustice had been done by the defendant government. The decisions of the

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tribunals to show that under the terms "all claims" and "injuries" breaches of contract were included. Among others he cited decisions of the commissions under the treaty with Spain, 1819 (8 Stat. L., 258); with Great Britain, 1853 (10 Stat. L., 998); with New Granada, 1857 (12 Stat. L., 985); with Costa Rica, 1860 (12 Stat. L., 1139); with Colombia, 1864 (13 Stat. L., 685); with Ecuador, 1862 (13 Stat. L., 633); with Peru, 1863 (13 Stat. L., 639); with Venezuela, 1866 (16 Stat. L., 316), and with Peru, 1868 (16 Stat. L., 349). He also mentioned the three Mexican commissions. The argument is on file in the Department of State Library.

commission, therefore, are at times contradictory, claims of exactly the same nature having been allowed by Wadsworth, Palacio and Lieber, and rejected when Zamacona became the Mexican Commissioner and Thornton the umpire.<sup>43</sup>

There have been occasions when international commissions would not exercise jurisdiction over contract claims.<sup>44</sup> It was agreed by the United States and Spain in the claims convention of February 12, 1871, that the arbitrators were not to have jurisdiction of claims growing out of contract.<sup>45</sup>

Where jurisdiction is exercised by mixed commissions, as is the general rule, the contract will be examined as would any other instrument open to judicial construction.<sup>46</sup> Among other factors the authority of the person contracting as

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<sup>43</sup> A full discussion of this perplexing question before the commission was undertaken by Mr. Commissioner Wadsworth in the case of *Treadwell & Co. (U. S.) v. Mexico*, July 4, 1868, quoted at length in *Opinions of the Commission*, vol. 4, 248, and vol. 7, 383. The claims were allowed in the cases of *Manasse*, Moore's Arb., 3462-3464; *Iturria*, Moore's Arb., 3464; *Moses*, Assignee, Moore's Arb., 3465; *Newton*, Moore's Arb., 3465; *Morrill*, Moore's Arb., 3465, and were disallowed by Thornton, umpire, in cases of supplies furnished, services rendered and other claims based on voluntary contract in the *Phipps* case, Moore's Arb., 3468; *Treadwell*, Moore's Arb., 3468; *Pond*, Moore's Arb., 3467; *Nolan*, Moore's Arb., 3484; *Light*, Moore's Arb., 3484; *Wallace*, Moore's Arb., 3475; *Kennedy & King*, Moore's Arb., 3474; *State Bank of Hartford*, Moore's Arb., 3473; *Shumaker*, Moore's Arb., 3472; *Chase*, Moore's Arb., 3469; *Kearney*, Moore's Arb., 3468; *Sturm* (dictum), Moore's Arb., 2756; *Dennison*, Moore's Arb., 2766; *De Witt*, Moore's Arb., 3466; *Widman*, Moore's Arb., 3467. Lieber's decision in disallowing the claim of *Thore de Lespes* for the hire of a steam tug to Mexico (Moore's Arb., 3466) is inconsistent with his other opinions.

<sup>44</sup> U. S.-British Mixed Commission of May 7, 1871. See *Hubbell (U. S.) v. Great Britain*, Moore's Arb., 3484-6; *Hale's Rep.*, 40; *Howard's Rep.*, 160, 752, 754.

<sup>45</sup> Agreement of Feb. 11-12, 1871, art. 15, Moore's Arb., 4802-4803.

<sup>46</sup> *Turnbull, Manoa, Limited, Orinoco, et al. (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston I*, 244, where Barge held a certain contract void *ab initio*. See also *American Electric and Manufacturing Co. (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston I*, 250, where Barge held a promise to declare void an existing contract as an illegal promise. See also *Frear (U. S.) v. France*, Jan. 15, 1880, Moore's Arb., 3488-3491; *Boutwell's Rep.*, 202, where it was found that the claimant had not performed the contract on his part.



agent for the government is always closely examined. The general rules of agency are applied,<sup>47</sup> although municipal courts have made distinctions between cases in which the government rather than a private individual is the principal.

A contract for unneutral service will as a general rule not be enforced either by municipal<sup>48</sup> or international<sup>49</sup> courts. There have been a few occasions where international commissions on the ground of equity or waiver of the illegality have made awards on unneutral contracts. This is especially so where the political party aided was successful or became at least a *de facto* government.<sup>50</sup>

The domestic commission under the act of March 3, 1849, held that while the United States was not justified in pressing a claim growing out of services in violation of the claimant's neutrality as a citizen of a neutral nation, yet if Mexico, the nation against whom such claim existed, sees proper to waive the objection and agrees to recognize the claim, the

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<sup>47</sup> *Lew Wallace (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3475-3476, in which case the Mexican agent had acted beyond the scope of his authority, for which reason the contract was held not binding on Mexico. See also *Beales, Nobles & Garrison case (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb., 3548-3564. In *Zander (U. S.) v. Mexico*, March 3, 1849, Moore's Arb., 3433, the failure to show the original authority of the agent or the subsequent ratification of his acts by the government barred the claim. In *Trumbull (Chile) v. United States*, Aug. 7, 1892, an award was made on the ground that claimant had a right to assume that the United States minister in engaging his legal services was authorized so to do.

<sup>48</sup> *Kennett et al. v. Chambers*, 14 How., 38; *Du Wurtz v. Hendricks*, 9 Moore's C. B. Rep., 586; see also Kent's Commentaries, I, 116.

<sup>49</sup> *Cucullu (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3478-3479; *Fitch (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3476-3477; *Wallace (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3475-3476.

<sup>50</sup> *Lake (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 2755, Opinion by Palacio, Commissioner; *Chew (U. S.) v. Mexico*, April 11, 1839, Moore's Arb., 3428, and other cases there cited; *Hunter, Duncan et al. (U. S.) v. Mexico*, April 11, 1839, Moore's Arb., 3427; *Cucullu (U. S.) v. Mexico*, July 4, 1868, Moore's Arb., 3478-3479; claims of Stephen Codman, No. 86, and John and Robert Gamble, No. 1783, were allowed by the mixed commission under the treaty with Spain of 1819, cited in Ashton's argument, *supra*.

tribunal cannot assume for it a defense expressly waived.<sup>51</sup>

Speculative contracts are not enforced.<sup>52</sup> The service itself where of an extraordinary character, such as the giving of advice in battle, has been held not measurable in money damages, but calling rather for a monument or some other mark of national gratitude.<sup>53</sup> While we have seen that as a general rule a claim for voluntary services is not pressed by the Department of State, international commissions, with the exception of the United States-Mexican Commission of 1868 after Thornton became Umpire, have not hesitated to allow damages for services thus rendered. They have occasionally held, however, that a demand for payment must be made upon the debtor government.<sup>54</sup> Where the debt has been acknowledged there is usually no hesitation either on the part of the government or of international commissions respectively to demand and to allow damages on claims

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<sup>51</sup> Meade (U. S.) *v.* Mexico, Act of March 3, 1849, Moore's Arb., 3430, 3432. Other commissions have held that only the nation whose laws have been violated can waive the illegality, and not the state aided by the unneutral act.

<sup>52</sup> Taussig (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb., 3472-3473, where the nonfulfillment of a contract for the sale of vessels, etc., to a government, said vessels having been purchased as a speculation on their subsequent sale, was held not to be an injury to person or property within the meaning of the protocol. See also Oliva (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston I, 780; see also American Trading Co. *v.* Chinese Indemnity Fund, 47 Ct. Cl., 563, 569.

<sup>53</sup> O'Dwyer (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb., 3568.

<sup>54</sup> Cucullu (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb., 3483. Palacio in a dictum said that under the word "injury" a mere omission of payment of a debt makes it necessary to bring it to the knowledge of the defendant government. Throughout the commission Palacio held that notice and a refusal of payment were conditions precedent to a valid claim. Union Land Company *et al.* (U. S.) *v.* Mexico, Act of Congress, Mar. 3, 1849, Moore's Arb., 3440, service rendered in securing immigrants. Meade (U. S.) *v.* Mexico, Mar. 3, 1849, Moore's Arb., 3431, expenses incurred in fitting out vessel in service of Mexico. The "Hermon," Green (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb., 3425, repairs and ship stores furnished to a vessel of war. Boulton *et al.* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston I, 26-29, carrying the mails. Turini (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston I, 51-52, services rendered as a sculptor. The Great Venezuelan Railroad (Germany) *v.*



arising out of contract.<sup>55</sup> Such acknowledgment has even been held to purge the contract of illegality, as, for example, the unneutral character of the act.

### *Bonds of Public Debt.*

We come now to the third class of contract claims, those arising out of a foreign government's unpaid bonds, held by a citizen. These obligations of the State differ in many respects from the contractual obligations arising out of a contract for concessions or the execution of public works. In the latter case, the government has entered into relations with a definite person; in the former, as bonds are usually payable to bearer and negotiable by mere delivery, the State

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Venezuela, Feb. 13, 1903, Ralston I, 638, railroad forcibly used to carry troops. Hudson Bay Co. (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb., 3459, goods supplied to shipwrecked sailors and other citizens of the United States to secure their relief from captivity by savage Indians and in repelling attacks, which service the government should have rendered. Eldredge (U. S.) v. Peru, Jan. 12, 1863, Moore's Arb., 3462, supplies furnished to Peruvian army. Dundonald (Gt. Brit.) v. Brazil, April 22, 1873; Moore's Arb., 2107-2108, military service rendered by Admiral Lord Cochrane. Arbitration between Great Britain and Portugal in 1840, for compensation due British soldiers and officers for services rendered to Portugal in her war of liberation, La Fontaine, op. cit., 93, 636. Underhill (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3433, charter of a vessel. Ulrick (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3434, lease of house for legation.

On the services rendered to Mexico by American citizens see a pamphlet, "The Republic of Mexico and its American creditors. The unfulfilled obligations of the Mexican Republic to citizens of the U. S. from whom it obtained material aid on credit." (Indianapolis, Douglass & Conner, 1869, 94 pp.)

<sup>55</sup> Sparrow (U. S.) v. Peru, For. Rel., 1895, Pt. II, 1036-1055; settled in 1896, For. Rel., 1896, 492-494. Lord J. Russell to Sir C. K. Wyke (Mar. 30, 1861) in the case of British bondholders whose unpaid bonds were converted into a liquidated debt against Mexico, St. Pap., vol. 52, 238-239. Cox & Elkins (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3430. Parrott (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3430. Eckford (U. S.) v. Mexico, Mar. 3, 1849, Op. 435 (not in Moore); Mercantile Insurance Co. (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3429. Meyer (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 2380. Rosenwig, Crosby *et al.* (U. S.) v. Peru, Dec. 4, 1868, Moore's Arb., 1651-1652. Hammaken (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb., 3471. Corcuera (Spain) v. Venezuela, Feb. 13, 1903, Ralston I, 936.

never knows to whom it is indebted until the bonds are presented for payment.

Some publicists regard such a bond as a contractual obligation subject to the same rules, both in interpretation and enforcement, as ordinary contract debts.<sup>56</sup> Hall even goes so far as to liken in principle a breach of a monetary agreement, *e. g.*, the non-payment of public loans, to tortious injuries committed by the government, though he admits a difference in practice in enforcing the two classes of claims.<sup>57</sup> The unpaid bond of a foreign government held by a citizen has been a frequent and most perplexing cause of international conflict.

Before discussing the nature of the enforcement of rights arising out of public debts, let us examine the nature of the contract and the law governing the transaction of subscribing to the public loan of a foreign state. If the lending citizen is domiciled in the country emitting the loan, we may for many purposes regard the contract as subject to the law of the debtor country. When, however, as is generally the case in external loans, the lending citizen or subsequent transferee-holder is domiciled not in the debtor country, but in his own or some other state, we meet difficult questions in the conflict of laws and in international law. Is the transaction one of private or public law, and if private, what law governs its interpretation?

In the first place we may admit that a contract has been concluded. If it is a contract of private law concluded by the state in its capacity as an ordinary contractor (*jure gen-*

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<sup>56</sup> Vattel, *Law of Nations*, Bk. II, Ch. XIV. §§ 214-216; Phillimore, *International Law* (3rd ed.), vol. II, Ch. III, 8 *et seq.* See opinion of Findlay, commissioner, in case of Aspinwall before U. S.-Venezuelan commission of 1885, *Moore's Arb.*, 3650.

<sup>57</sup> Hall, *International Law* (6th ed.), 276.



*tionis*),<sup>58</sup> there would be some ground for asserting that the contract is subject to the local law of the debtor state,<sup>59</sup> or as the contract is often to be performed in the country of the lending citizen, where the interest and principal are sometimes to be paid, that the law of the place of performance governs. Again, the loan may be subscribed in a third state, as, for example, where a Chinese loan is underwritten by a New York banker, the individual bonds being held by citizens of Germany; the loan having been made in a third state, the *lex loci* might be regarded as the law governing the contract. Other possibilities have been suggested, as, for example, where the loan has been guaranteed, that the law of the guaranteeing state governs,<sup>60</sup> or that the parties themselves may agree on the law governing the contract.<sup>61</sup>

If the contract were concluded between individuals or between a municipal corporation and an individual, the above theories might warrant consideration. The factor which makes the public loan a contract *sui generis* is that one of the contracting parties is a sovereign and therefore not sub-

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<sup>58</sup> We cannot here discuss the distinctions between contracts made by a government in its capacity as a business corporation and engagements contracted in its character as a sovereign. We may merely note the usual rule of the suability of the government on contracts of the former category, and its immunity in the case of contracts of the latter description.

<sup>59</sup> Freund, G. S.: *Die Rechtsverhältnisse der öffentlichen Anleihen* (Berlin, 1907), 64 *et seq.* This is probably the most thoughtful book on the subject of public loans. Loening, Edgar: *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (Halle, 1903), 256 and authorities there cited. See also Freund, G. S. *Der Schutz der Gläubiger gegenüber auswärtigen Schuldnerstaaten* (Berlin, 1910), 14. Pflug, Karl: *Staatsbankrott und internationales Recht* (München, 1898), 15-16. Cuvelier in *Rev. de droit international* (1888), 111.

<sup>60</sup> Wuarin, Albert: *Essai sur les emprunts d'états* (Paris, 1907), 88 *et seq.* Imbert, Henri M.: *Les emprunts d'états étrangers* (Paris, 1905), 50 *et seq.*, 96.

<sup>61</sup> Meili, Fr.: *Das internationale Zivil- und Handelsrecht*, II, 57. Clerin, Georges: *Inexécution par un état de ses engagements financiers extérieurs* (Dijon, 1908).

ject to the ordinary rules of legal obligation, and the other a non-resident alien, against whom the local territorial law is not enforceable.<sup>62</sup> The debt is generally authorized and created by an act of legislation, which escapes all judicial review. The inherent reservation of the possibility of modifying the terms of the loan, suspending or even repudiating it by an act of sovereignty similar to that which created it, has led some writers to the conclusion that the obligation of the state is one of honor only, a moral, and not a legal obligation,<sup>63</sup> so far at least as its enforcement in municipal courts is concerned. Freund tells us that several German writers regard it as discretionary with the state whether it will take up foreign loans.<sup>64</sup> Zorn even regards the payment of interest as the exercise of a sovereign right.<sup>65</sup> The failure of a state therefore to take up a public loan, not being justiciable in municipal courts, has been regarded as not legally a breach of a contractual obligation. This confuses the *nature* of the contract with the *means* of its enforcement.

The foreign citizen would never lend his money on such uncertain security. He does in no sense regard himself as subject to the local law of the debtor state, as he has never entered its territorial jurisdiction. His rights as lender and the obligations of the debtor are derived from the contract of loan which neither the creditor nor his government regards as purely one of private law to be interpreted by the local courts of the debtor state.

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<sup>62</sup> Freund, *Der Schutz der Gläubiger*, etc., 15; Wuarin, *op. cit.*, 34.

<sup>63</sup> Bar, Ludwig von. *The theory and practice of private international law* (2nd ed., trans. by G. R. Gillespie, Edinburgh, 1892), 1152, and certain French cases there cited. Politis, Nicholas E.: *Les emprunts d'état en droit international* (Paris, 1894), 280. Milanowitsch, cited by Freund, *Rechtsverhältnisse*, etc., 56.

<sup>64</sup> Freund, *Schutz der Gläubiger*, 13.

<sup>65</sup> Zorn in *Bankarchiv*, VI, 106, cited by Freund, *Schutz der Gläubiger*, 13.



The mixed private and public nature of the transaction of subscribing to a foreign loan shows that it partakes of the nature of an international contract, and that its breach, if not justiciable before municipal courts, does give rise, under certain circumstances, to the diplomatic interposition of the national government of the creditor, and in practice has at times resulted in armed intervention. These questions we shall discuss hereafter.

The transaction of subscription to a foreign public loan is not purely an international contract, for this could be concluded only by states and not by a state and the subjects of another state. The contract is, however, by its nature under the protection of international law and is what Bluntschli called a quasi-international contract.<sup>66</sup> There is certainly some analogy between a contract (1) between Venezuela and Germany and (2) between Venezuela and a German citizen for the building of a vessel or the borrowing of money. Neither contracting party in these cases would be willing to submit to the national municipal law of the other.

If we turn to the jurisdiction of courts and the means of enforcement of the contract, the international nature of the legal relation created will become apparent. While in theory the jurisdiction of the courts of the debtor state may be invoked, several contingencies in connection with the public loan must always be borne in mind. First, the debtor state

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<sup>66</sup> Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (Nördlingen, 1878, 3rd ed.), §§ 442, 433 (b). Pflug, *op. cit.*, 40-41.

The argument against the international nature of the contract of public loan, that individuals cannot derive rights from international agreements, as they are not subjects of international law, has been greatly weakened by the Hague Convention for the establishment of an international prize court, and the growing opinion, shared by authorities like Westlake and Bonfils, that individuals may derive subjective rights from international agreements. See also art. 2 of the Convention establishing the Central American Court of Justice.

may or may not permit itself to be sued.<sup>67</sup> While most states now freely subject themselves to suit in cases of ordinary contracts, many states still decline to extend this right so far as the public debt is concerned. Many states of the United States have repudiated their debts and have declined to permit themselves to be sued on them.<sup>68</sup> Again, as the public loan is created by legislation, an act of sovereignty, so it may be suspended, reduced or even repudiated by a similar act of sovereignty, by which the national courts are bound. The creditor, therefore, is juridically opposed to a sovereign who may with perfect legality, by an act of sovereignty, deprive him of his substantive right and of his remedy. In other words, the state in the exercise of its sovereign powers may regulate the execution of its contract of loan in any manner conformable with its public interest.<sup>69</sup> Again, the improbability in many states of securing an impartial judicial determination by national courts in cases of this kind makes the creditor's position precarious. To sue the debtor state on a public loan, therefore, is practically useless. There are some states whose national courts might grant a creditor relief. These are the states that are never sued on their national debts.

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<sup>67</sup> Twycross *v.* Dreyfus, 36 Law Times Rep. (N. S.) (July 21, 1877), 752, 755. See also Moulin, *La Doctrine de Drago* (Paris, 1908), 86 *et seq.*

<sup>68</sup> Scott, William A. *The repudiation of state debts* (New York, 1893), particularly Chap. I, in which the constitutional and legal aspects, with the decisions of the Supreme Court and state courts are lucidly presented.

<sup>69</sup> Lewandowski, Maurice. *De la protection des capitaux empruntés en France par les Etats étrangers* (Paris, 1896), 24 *et seq.* While apparently accepted as a principle, the theory is by no means undisputed that a state contracts a public loan in its character as a sovereign, *jure imperii*, and is not bound contractually to its creditors. See Moulin, H. A., *La Doctrine de Drago* (Paris, 1908), 76 *et seq.*; Freund, *Rechtsverhältnisse*, etc., 59-61; speech of M. Ruy Barbosa (July 23, 1907) at the Hague Conference of 1907, *Actes et Discours de M. Ruy Barbosa*, 60 *et seq.*; see also the recent case of *De Andrade v. the government of Brazil*, reported in *Clunet* (1913), vol. 40, 237.



To sue the debtor state before the courts of the creditor is still less practicable. As a general rule municipal courts decline to take jurisdiction over foreign states as defendants.<sup>70</sup> The exception of voluntary submission and questions concerning real estate are hardly of practical significance for the present case.

The French courts take the firm position that bondholders of the debt of a foreign state cannot sue before the French courts.<sup>71</sup> The English courts have usually declined to exercise jurisdiction over foreign states, and in the case of bondholders of foreign debts have unequivocally declared themselves jurisdictionally incompetent.<sup>72</sup> This is the rule of the German and Austrian courts<sup>73</sup> and has been the uniform

<sup>70</sup> Bynkershoek is the father of this theory.

Loening, E. *Die Gerichtsbarkeit über fremde Staaten u Souveräne* (Halle, 1903) is one of the leading works on the subject. The opinions of courts are discussed, p. 23 *et seq.*; the opinions of writers, p. 55 *et seq.* See also Brie, Fischer & Fleischmann, *Zwangsvollstreckung gegen fremde Staaten u Kompetenzkonflikt* (Breslau, 1910), containing three opinions rendered at the request of Russia in the case of *Hellfeld v. Russia* on the question of the jurisdiction of German courts over funds of Russia in Germany and the possibility of execution against them. The translation of the decision of the German court for the determination of jurisdictional conflicts in the now famous *Hellfeld* case may be found in 5 *Amer. Journ. of Int. Law* (1911), 490-519.

See on the whole subject an able article by Droop in Gruchot's *Beiträge zur Erläuterung des deutschen Rechts*, vol. 26, 289-316, in which the decisions of courts are carefully reviewed. Some writers have made a distinction as to jurisdiction over foreign states, depending upon whether the transaction in question involved the defendant state in its capacity as a sovereign (*jure imperii*) or as a *fiscus* (*jure gentionis*), granting immunity from jurisdiction in the former case, but asserting it in the latter. The most noteworthy of these writers are Laurent, *Droit civil international* (Paris, 1880), vol. 3, 42-103, and von Bar, *op. cit.*, 1101 *et seq.* They have been followed by a number of courts, notably those of Belgium and Italy.

<sup>71</sup> See the cases cited in Weiss, A. *Traité de droit international privé*, vol. 5, 94; Loening, *op. cit.*, 45.

<sup>72</sup> Westlake, J. *A treatise on private international law* (London, 1905, 4th ed.), §§ 190, 192 and cases there cited. See particularly *Twycross v. Dreyfus* (1877), 36 *Law Times Rep.* (N. S.), 755, 757, decision of Jessel, M. R.

<sup>73</sup> Citations of cases in Brie, *op. cit.*, and Loening, *op. cit.*, 23 *et seq.*

rule in courts of the United States.<sup>74</sup> In Belgium and Italy the courts seem to have adopted the distinction of administrative law between transactions of the state undertaken *jure imperii* and *jure gentionis*, and to have exercised jurisdiction in the latter case.<sup>75</sup>

If there were still any doubt as to the impracticability of relief by suit against a foreign government in municipal courts, it would be dispelled by the certainty that execution of the judgment, even if obtainable, is practically impossible. No legal process lies against the property of a foreign state, and even the jurisdictional distinction made by some courts between acts *jure imperii* and *jure gentionis* is disregarded in the matter of execution. The exception of actions involving real estate does not concern us here. Even attachment and garnishment proceedings against the movable property of foreign sovereigns are almost uniformly dismissed.<sup>76</sup>

It is thus apparent that national municipal courts, either of the debtor state or of the country of the creditor, are unable to secure the unpaid creditor any remedy. He is not left helpless, however. The sanction for a violation of his rights is found in international law and practice, in that states have frequently interfered in behalf of their creditor subjects to secure the payment of unfulfilled national obligations of foreign states. Before examining the legitimacy of diplomatic interposition and intervention for such unpaid

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<sup>74</sup> Moore, J. B., in his American notes to Dicey, A. V. A digest of the laws of England with reference to the conflict of laws (London, 1896), p. 229. See leading case of *Schooner Exchange v. McFaddon* (1812), 7 Cranch, 116; 30 Cyc., 104, and cases there cited.

<sup>75</sup> Cases cited in Loening, *op. cit.*, 52-54.

<sup>76</sup> Brie, *op. cit.*, 45 *et seq.*; Loening, *op. cit.*, 139 *et seq.* The cases of *von Hellfeld v. Russia*, *supra*, *Mason v. Intercolonial Railway of Canada* (1908), 197 Mass., 349. See article by Nathan Wolfman, "Sovereigns as Defendants," in 4 Amer. Journ. of Int. Law (1910), 373-383, in which a departure from the general rule is urged in favor of jurisdiction over property engaged in private or commercial undertakings.



creditors, let us inquire into the nature of the transaction by which a citizen becomes a holder of a share in the public debt of a foreign nation.

We have already seen that the emission of a public loan takes place by legislative act. The individual abroad may obtain the bond either through a direct transaction with the government or through a banker who has underwritten the loan. As a general rule, however, the bonds are purchased in the open market as industrial securities would be, without any direct relation with the debtor government. Being payable to bearer, they pass from hand to hand, from national to national, by mere delivery.

Again, the price paid takes into account the value of the security, both intrinsically and as an investment. Thus the solvability of the government bears a direct relation to the price of its bond. Weak and unstable governments must sell below par and pay high rates of interest. The original capitalist takes advantage of the necessities of the borrowing state and exacts discounts and interest accordingly, and subsequent dealers in the bond know the conditions equally well. The legal fact that the emission was an act of sovereignty, that the debt may be repudiated or reduced by a similar act, that the usual civil remedies are barred, and that the state is the sole judge of its ability to pay, are known to all parties to the transaction. The investor therefore buys with full notice and assumption of the risks, and has weighed the probabilities of large profits against the danger of loss.

It is for these reasons that it seems unfair, both to the debtor state and to the fellow nationals of the creditors (who may indeed change from day to day), that the government of the creditor should make the breach of such a contractual obligation to a citizen who accidentally holds a

foreign public bond a cause for armed international action involving the whole nation in the burden, and making the government in effect the underwriter and guarantor of his investment in the securities of a foreign government.

This is the principal argument of the Drago Doctrine, first advanced in the celebrated note of December 29, 1902, from Dr. Luis Drago, Minister of Foreign Affairs of Argentina, to the Argentine Minister at Washington, and by him submitted to the Department of State, on the occasion of the joint intervention of Great Britain, Italy and Germany against Venezuela. The argument led up to the recommendation of proposed policy, intended to be a corollary to the Monroe Doctrine, that "the public debt [of an American state] cannot occasion armed intervention, nor even the actual occupation of the territory of American nations by a European power."<sup>77</sup>

We may note that Drago protests only against the use of armed force in the collection of public debts and not directly against diplomatic interposition. Most of the writers who

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<sup>77</sup> The text of the Drago note will be found in *Foreign Relations* 1903, 1-5. Dr. Drago has written the following monographs on the doctrine which has been named after him. *Cobro coercitivo de deudas publicas* (Buenos Ayres, 1906); *Les emprunts d'Etat et leurs rapports avec la politique internationale*, *Revue Générale de droit international public*, vol. 14, 251, translated practically in full in his article "State loans in their relation to international policy," in 1 *Amer. Journ. of Int. Law* (1907), 692-726. Among the best literature in English are two thoughtful articles by George Winfield Scott, "International law and the Drago doctrine" in *North American Review*, Oct., 1906, 602-610, and "Hague convention restricting the use of force to recover contract claims" in 2 *Amer. Journ. of Int. Law*, 1908, 78-94; an article by Amos S. Hershey, "The Calvo and Drago doctrines," in 1 *Amer. Journ. of Int. Law*, 1907, 26-45; and Chapter VIII, vol. 1, pp. 386-422, of James Brown Scott's *The Hague Peace conferences of 1899 and 1907* (Baltimore, 1909). One of the best books is Moulin's *La doctrine de Drago* (Paris, 1908), and a useful collection of documents is to be found in S. Perez Triana, *La doctrina Drago* (Londres, 1908). Further references to foreign literature may be found in Bonfils, *Manuel* (6th ed., 1912), 186, n. 4. See also a recent work by Vivot, A. N. *La doctrina Drago*, Buenos Aires, 1911.



have discussed the question have failed to note this distinction, possibly because a denial of forcible measures deprives interposition of its most effective sanction. They therefore consider the protest against the sanction as directed against the whole remedy, though even without the potential use of force it still has some room for application. In expressly stating that he did not intend to make his "doctrine" a defense "for bad faith, disorder and deliberate and voluntary insolvency," Dr. Drago has, we believe, set the proper bounds to his principle, although, as we shall point out, the creditor state is still (except as restrained by the Porter proposition) left the sole judge of the existence of these limiting conditions.

Before proceeding further, we may discuss briefly the opinions of publicists and the practice of nations in the matter of intervention to collect public debts, by which we mean diplomatic interposition followed by force. Westlake, as we have seen (*supra*, p. 6), has properly recognized the distinction in substance and in remedial process between contracts made with the state in its character as a fiscus or business administrator and those arising out of subscription to or transfer of a public bond. He regards honest inability to pay as a title to consideration, and unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavorable to the latter, he thinks "the assistance of their state ought not to be granted to the bondholders of public loans."

Some of the earlier writers, prominent among them Grotius and Vattel, admitted the legitimacy of reprisals against a state or sovereign who refused to pay a lawful debt (*supra*, p. 9). Inability and refusal to pay are not, however, identical. Phillimore and Hall, supporting the views of the

British government, contend that a debt contracted by a foreign government toward a citizen constitutes an obligation of which the country of the lender *has a right* to require and enforce the fulfillment.<sup>78</sup> Yet Phillimore approves, as he says, "the proposition of Martens . . . that the foreigner can only claim to be put on the same footing as the native creditor of the state."<sup>79</sup> Rivier, one of the foremost authorities, has in this respect asserted a far-reaching right of intervention under circumstances far more unreasonable than those admitted by other publicists. Unless we may assume that the words we have underlined presuppose fraud and bad faith, his doctrine will hardly find general support, though it must be admitted that the weaker states have at times found themselves intervened against under circumstances no harsher than those mentioned by Rivier

"The fortune of individuals, subjects of the state, forms an element of the riches and prosperity of the state itself. It has an interest in the maintenance and increase of that fortune. If it is compromised by the act of a foreign state *which administers its finances badly, which betrays the confidence individuals placed in it when they subscribed to loans on conditions that are not observed, and which violates its engagements in regard to them*, the state to which the injured individuals belong is evidently authorized to take their interests in hand in any manner which it shall deem suitable; it may proceed either by diplomacy or by reprisals . . . . Individuals have not, as a general rule, the right to require of the state that it shall thus take their cause in hand. The state may refuse to act in their favor for reasons of which it is the sole judge; but if it acts, it only exercises its right. It may see to it, perchance, according to the circumstances, that its subjects are better treated than those of other states,

<sup>78</sup> Phillimore, Int. Law (3rd ed.), vol. 2, Ch. III, 8 *et seq.*; Hall, Int. Law (6th ed.), 275-276.

<sup>79</sup> Phillimore, *op. cit.*, vol. 2, 14.



or than those of the insolvent state. This is, from the legal point of view, a matter of absolute indifference."<sup>80</sup>

G. F. de Martens sanctions intervention in case of "violent financial operations" of the debtor state depriving creditors of their loans, but he adds that creditors cannot demand better treatment than nationals. Although cited by Phillimore as an advocate of intervention, opponents may also find support in his ambiguous doctrines.<sup>81</sup>

The majority of writers consider armed intervention for the mere non-payment of public debts an unjustifiable procedure, their reasons being similar to those advanced by Dr. Drago, to wit: That hazardous loans should be discouraged; that those making them have full notice of the risks; that foreigners cannot expect to be preferred to native creditors; that force is never resorted to except against weak states and is often a pretext for aggression or conquest; and, finally, that the loss of credit and standing incurred by the state is an ample and effective penalty for the failure to fulfill its obligations.<sup>82</sup> The objections of writers, however,

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<sup>80</sup> Rivier, Alphonse. *Principes du droit des gens* (Paris, 1896), vol. 1, 272.

<sup>81</sup> G. F. de Martens, *Précis du droit des gens* (Paris, 1864), vol. 1, 298, § 110. See also Phillimore, *op. cit.*, 14, and Pradier-Fodéré, *Traité*, vol. 1, § 405, p. 623, note.

<sup>82</sup> These authorities are enumerated and citations to their works given in the second part of footnote 34 of Hershey's article in 1 *Amer. Journ. of Int. Law* (1907), 37; in the work of Wuarin, *op. cit.*, 155-159, and in the address of Gen. Horace Porter before the Second Hague Conference on July 16, 1907, in presenting the American proposition for the limitation of force in the collection of contractual debts. *La deuxième Conférence internationale de la Paix*, vol. II, 229-233. Also printed in English (Hague, 1907). The principal publicists who oppose what we may call financial intervention are F. de Martens, Westlake, Holland, Bonfils, Calvo, Pradier-Fodéré, Rolin-Jacquemyns, Despagnet, von Bar, Liszt, Geffcken, Kebedgy, Nys, Merignhac, Féraud-Giraud, Weiss, Olivecrona and Floecker. Gen. Porter also cited Rivier, but this must have been an oversight. See also Collas, *Der Staatsbankerott und seine Abwicklung* (Stuttgart, 1904), 51, and Freund, *Rechtsverhältnisse*, etc., 271.

are directed not to diplomatic interposition, but rather to an *excess* of interposition in the use of armed force to collect unpaid public loans.

The preponderance of opinion is, however, that under certain circumstances intervention to secure the payment of public loans is legitimate. Authorities differ merely as to the nature of the circumstances. In general we may say that intervention is not warranted in the case of an honest inability of the state to pay its debts, but only when, the means being at hand, the debtor state wilfully refuses to pay; or further, when foreign creditors are illegally treated, especially if they are discriminated against in favor of national creditors, or if certain categories of creditors are preferred to others; or when special funds assigned as security to the payment of certain debts are diverted or suppressed;—in short, when *bad faith* may be considered the moving cause of the non-payment. In the present condition of international law, in which states, large and small, have no common superior to control or check them, each state has the legal right of deciding for itself whether the conditions warranting intervention exist. *In the use of this right, the power of enforcing its demands has often been a factor more controlling than the mere legitimacy or fairness of its action.*<sup>83</sup>

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<sup>83</sup> The decision of the Hague Permanent Court of Arbitration in the Preferential Claims case of Germany, Great Britain and Italy against Venezuela has been considered an approval of the use of force in the collection of claims based on contract or public debt. While it is true that the use of force appears to have been sanctioned by the tribunal by the allowance of preferential treatment of the three blockading powers, it is certain that only a small part of the claims pressed arose out of contractual debts. The primary reason of the blockade was the stubborn reiteration by Venezuela of the exclusive jurisdiction of its national courts and the absolute refusal to arbitrate. Castro's arrogance exhausted the patience and temper of the powers. See article by Basdevant, Jules: *L'action coercitive Anglo-Germano-Italienne contre le Venezuela (1902-1903)*, *Rev. gén. de droit int. pub.*, vol. 11, 363-458.



There is, in fact, no definite rule as to diplomatic intervention in the matter of unpaid public loans, except in so far as the convention of the Second Hague Conference for the limitation of the use of force in the collection of contractual debts will operate as a check by requiring under certain conditions a preliminary resort to arbitration.

The European powers have on several occasions intervened to secure the payment of public loans due their subjects. Their action has taken various forms. Sometimes it has been merely the use of good offices and an approval of arrangements for financial control made by national bankers or associations of bondholders with the debtor state, as in the case of Turkey (1881) and Servia (1904); an assumption of limited governmental control, as in the case of the United States in the Dominican Republic (1907); or joint intervention of several powers assuming financial control as in the case of Tunis (1868), of Greece<sup>84</sup> (1897) and of Egypt (1880).<sup>85</sup> This is intervention in the true sense, in that it involves an administrative control over a certain

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Hershey, Amos S.: The Venezuelan affair in the light of international law, *American Law Register*, vol. 51, 249-267. The Hague decision is criticised by André Mallarmé in an article *L'arbitrage vénézuélien* in *Revue générale*, vol. 13, 423-500. For the correspondence see *Asuntos Internacionales*, two volumes of the Yellow Book of Venezuela published in 1903 and extracts printed in the Appendix to Ralston's Report of the Venezuelan Arbitrations.

<sup>84</sup> Kebedgy, Michel S. *Les difficultés financières de la Grèce et l'intervention des états étrangers*. *Revue générale*, vol. 1, 261-271. Imbert, Henri Marc, *Les emprunts d'états étrangers* (Paris, 1905) gives an account of the various cases of intervention in Turkey, Egypt, Portugal, Greece, Tunis (pp. 60-99). Kebedgy, M. S. *De la protection des créanciers d'un Etat étranger*, *Clunet*, vol. 21, 59-72, 504-519. See also Wuarin, Freund and Politis, *op. cit.* Meili, Fr. *Der Staatsbankrott und die moderne Rechtswissenschaft* (Berlin, 1895). Wuarin, article in *Clunet*, Vol. 29, 25 *et seq.*, 420-431.

<sup>85</sup> Kauffmann, Wilhelm. *Das internationale Recht der ägyptischen Staatschuld* (Berlin, 1891). See also article by same author in *Revue de droit international*, vol. 22, 556-586; vol. 23, 48-75, 144-175, 266-316. A bibliography on the Egyptian debt will be found in *Clunet*, vol. 30, 681-683.

portion of national resources and revenues. It seems to be more proper on the part of a state or states guaranteeing the debt of some weak state placed under their guardianship. Both this form of action and the collection of loans by force of arms without complete intervention, as the joint operations against Mexico in 1861 and against Venezuela in 1902, have invariably been carried out against weak states. When Spain, Italy, Austria and Hungary at different times suspended or reduced their public obligations there was no intervention on the part of the powers whose subjects had shares in the unpaid or underpaid loans. This is at least cumulative evidence in establishing that *intervention or the use of arms to collect public loans is a question of power and politics rather than a rule of law.*

Notwithstanding Great Britain's participation in the operations against Mexico in 1861, against Egypt in 1880 and against Venezuela in 1902, her statesmen have always asserted it to be England's policy not to interpose diplomatically in behalf of British holders of bonds of foreign governments, though reserving their liberty of action. The British view was expressed in its now accepted form in the celebrated circular sent by Lord Palmerston in 1848 to the British representatives in foreign states. He then declared:

"It is therefore simply a question of discretion with the British government whether this matter [the non-payment of public loans] should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations."

Referring to the economic disapproval of British investments in foreign loans, as against British enterprises, he added that the British government has



"hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions . . . ."

"But, nevertheless, it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiations."<sup>86</sup>

Palmerston's note has occasionally been misinterpreted by writers who use his note in support of an argument for non-intervention. When he stated that interference was "for the British government entirely a question of discretion, and by no means a question of international right," he did not intend to cast any doubt on the *right* of Great Britain to interfere (as some writers have quoted him), but he meant that there was *no question* about the right to interfere. This is clearly shown by the following sentence of the note.<sup>87</sup>

Subsequent secretaries for foreign affairs, emphasizing the speculative character of the transaction of subscription to a foreign loan, have declined to do more than exercise their good offices in behalf of unpaid bondholders. Great Brit-

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<sup>86</sup> Palmerston's circular is quoted in full by Phillimore, *op. cit.*, II, 9-11, and by Hall, 276-277. Other secretaries for foreign affairs of Great Britain have expressed, in language even more unreserved than that of Palmerston, the policy of non-interference. See, for example, Canning and Aberdeen (St. Pap., 28, pp. 961, 967, 969), Russell (St. Pap. 52, pp. 237-239), Derby, Granville (quoted by Phillimore, *op. cit.*, pp. 12-13), and Salisbury (cited by Hall, note p. 277). Balfour, when Prime Minister in 1902, supported this view; see Scott's Hague Peace Conferences, vol. 1, 402.

<sup>87</sup> See, for example, Gen. Porter's address of July 16, 1907, printed separately and quoted in Scott's Hague Peace Conferences, vol. 1, 402.

ain's practice of non-interference is entirely a matter of policy and is not to be construed as the recognition of an international legal principle.<sup>87a</sup>

The practice of non-interference of the United States on the other hand has been not only a matter of policy, but the carrying out of a fundamental principle that the diplomatic interposition of the United States cannot be invoked (within the recognized limitations) in behalf of contractual claims.<sup>88</sup> If certain revenue or security has been set aside for the repayment of a loan, it seems probable that the United States would, following the practice of other nations, interpose diplomatically to prevent any diversion of the security or the pledged revenue.<sup>89</sup> Attorney-General Cushing in the course of an elaborate opinion on the Texas bonds question declared that

"A public creditor, like a private creditor, has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, when made by a government, renders such source of revenue, like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed incumbrance, which the government ought not, in justice to the creditor, to abolish, lessen, or alienate until the debt has been satisfied."<sup>90</sup>

In the case of certain bonds issued by Hayti to American citizens for work and materials furnished, Secretary of State Sherman protested against a proposed law of Hayti having

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<sup>87a</sup> The recent threat of Great Britain to dispatch a warship to Guatemala to collect the unpaid interest and capital on bonds held by British subjects may be charged to the action of Guatemala in diverting the security of the loan, an export tax on coffee, to other purposes.

<sup>88</sup> Citations noted in Moore and Wharton, *supra*, p. 463.

<sup>89</sup> Cases cited, *supra*. See also opinion of Little, commissioner, in *Aspinwall (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb., 3641-3642.

<sup>90</sup> Opinion of Sept. 26, 1853, 6 Opin. Atty.-Gen., 130, 143.



in view the conversion of the bonds at a rate greatly depreciatory of their value.<sup>91</sup> There would indeed seem to be some difference between bonds purchased in the open market as an investment and bonds received in payment for services and goods, in the hands of the original parties.

Where the loan has been liquidated and a new agreement for payment made, the origin of the debt seems to have been no deterrent against its enforcement. So in Mexico, in 1861, Lord John Russell withheld recognition of the Mexican government until Mexico had agreed to carry out an arrangement made with British bondholders.<sup>92</sup>

Both the United States and Great Britain have authorized their representatives abroad to receive payment for their citizen bondholders, as a matter of convenience both to the debtor government and to the citizen,<sup>93</sup> and where the bonds of one foreign government have been wholly or largely held by the citizens of another, the United States has on one occasion at least sanctioned the endeavor of the government of the creditors to effect by diplomatic negotiation an adjustment of their claim.<sup>94</sup>

Dr. Drago, in advancing his doctrine as a corollary to the Monroe Doctrine, had some reason to expect the approval of the United States, not only because of its interest in the maintenance of the Monroe Doctrine, but because of its traditional attitude in the matter of contract claims. Dr. Drago quoted from Monroe's message that the United States

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<sup>91</sup> Mr. Sherman, Sec'y of State, to Mr. Powell (Oct. 26, 1897), Moore's Dig., VI, 729.

<sup>92</sup> Lord J. Russell to Sir C. Wyke (Mar. 30, 1861), St. Pap., vol. 52, 237, 239.

<sup>93</sup> Mr. Frelinghuysen, Sec'y of State, to Mr. Wright (Jan. 17, 1884), Moore's Dig., VI, 713; Phillimore, *op. cit.* vol. 2, 13.

<sup>94</sup> Mr. Frelinghuysen, Sec'y of State, to Mr. Wright (Jan. 17, 1884), Moore's Dig., VI, 713. He stated, however, that the occasions on which this had been done were not common enough to form a rule of action.

"could not view any interposition for the purpose of oppressing [the countries of the American continent], or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly spirit toward the United States."<sup>95</sup>

In Secretary of State Hay's reply to the Drago note (one of "cordial evasion," as Dr. Drago himself has expressed it), Mr. Hay quoted from President Roosevelt's message of 1901 to the effect that

"we do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power,"<sup>96</sup>

but added an unequivocal approval of arbitration of claims growing out of alleged wrongs to individuals.

Both Mr. Root, as Secretary of State, and President Roosevelt, having in mind the difficulties of Venezuela in 1903 and those of the Dominican Republic in 1894 and 1904 in endeavoring to ward off foreign intervention, were anxious to have the question of the use of force in the collection of contractual claims settled by the agreement of states. Mr. Root therefore on June 18, 1906, instructed the delegates of the United States to the Third American Conference of American States at Rio Janeiro as follows:

"It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments."

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<sup>95</sup> President Monroe's Annual Message (Dec. 2, 1823), Amer. St. Pap., For. Rel., V, 246, 250, quoted in Moore's Dig., VI, 401, 402. Richardson's Messages, vol. 2, 209 *et seq.*

<sup>96</sup> Mr. Hay, Sec'y of State, to Señor Garcia Mérou (Feb. 17, 1903), For. Rel., 1903, 5-6.



After deprecating its injurious effect upon the welfare of weak and disordered states, whose development ought to be encouraged in the interests of civilization, he added:

"It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrong-doing or violation of treaties as to justify the use of force. This government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class."<sup>97</sup>

He recommended, however, that as most of the American states were still debtors and would, by such a resolution, resolve how their creditors should act, it would be more fitting that they should request the Hague Conference to consider the subject, where both creditors and debtors would be assembled.

The Rio Conference made such a request, and the United States delegation at The Hague, on instructions from Mr. Root, as Secretary of State, brought forward a proposition to the effect that the use of force for the collection of contract debts is not permissible until after the justice and amount of the debt, as well as the time and manner of payment, shall have been determined by arbitration.<sup>98</sup>

Gen. Horace Porter took charge of this proposition, and made the principal address in its support. After several amendments to his original draft, the conference by a vote

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<sup>97</sup> Senate Doc. 365, 59th Cong., 2nd Sess., 41-42.

<sup>98</sup> In the Russian program of the First Peace Conference of 1899 regarding international arbitration a clause had been included providing that arbitration shall be obligatory "in the case of differences or conflicts regarding pecuniary damages suffered by a state or its citizens in consequence of illegal or negligent action on the part of any state or the citizens of the latter." This proposition for the arbitration of pecuniary claims was for various reasons dropped.

of 39 in favor and 5 abstentions (Belgium, Roumania, Sweden, Switzerland and Venezuela) adopted the following convention—a few states making special reservations:

“The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

“This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.”

While not rejecting completely the possibility of forcibly collecting contract debts, the convention represents a considerable step in advance, inasmuch as it makes the use of force conditional upon (1) a refusal to arbitrate; (2) making a formulation of an agreement impossible after arbitration is accepted; (3) failure to carry out the award. These are more definite and more appropriate limitations than the vague terms “bad faith,” “deliberate and voluntary insolvency,” etc., which we may infer even the opponents of intervention and Dr. Drago himself would consider as justifiable causes of intervention.<sup>99</sup>

A few countries either declined to subscribe to the convention or in adhering registered important reservations. Switzerland and Venezuela declined to sign the convention (although the latter was very willing to accept the renunciation of force) on the ground that it ousted the national

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<sup>99</sup> A good account of the preliminary instructions and principal speeches and proposals in connection with this convention for the limitation of the employment of force, with appropriate quotations, may be found in J. B. Scott's *Hague Peace Conferences*, vol. 1, Chap. VIII, 386-422. See also article by G. W. Scott, *supra*, in 2 *Amer. Journ. of Int. Law* (1908), 78-94. The convention in full is printed in Scott's *Hague Peace Conferences*, vol. 2 (Documents), 357-361.



courts of jurisdiction. One can understand Switzerland's unwillingness to be bound to arbitrate a question in which its courts, internationally recognized as impartial, have jurisdiction.<sup>100</sup> Venezuela's protest, which took the following form—

“recourse to arbitration should be permitted only in the case of denial of justice after the judicial remedies of the debtor state had been exhausted”—

is to be regarded as traditional. Unless its judicial organization is acknowledged as more independent now than in 1902, it is unlikely that mere protests will be of any more avail than they were in 1902. Seven other Latin-American republics, by way of reservation, joined in the objection of Venezuela.

The principal reservation was made by Dr. Drago himself, on the part of Argentine. After declaring that ordinary contracts should be arbitrable only in case of denial of justice after the exhaustion of local remedies, he added:

“Public loans with bond issues constituting the national debt cannot in any case give rise to military aggression nor to the occupation of the soil of American states.”

In this reservation Argentine was joined by Colombia, Ecuador, Guatemala, Nicaragua, Paraguay, Peru and Uruguay.<sup>101</sup>

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<sup>100</sup> In theory at least the strong and well-organized states have renounced an inherent right. Dr. Heinrich Pohl in the *Zeitschrift für Politik* (vol. 4, 134, 138) criticises Germany for having ratified the Porter Proposition (*Reichsgesetzblatt*, 1910, 59-81), for he states that Germany may sometimes be a defendant state and will be bound by the agreement to arbitrate, thus ousting its courts of jurisdiction.

<sup>101</sup> See table of reservations in J. B. Scott's *Hague Peace Conferences*, vol. 2, 532-534, and article by G. W. Scott, *supra*, p. 89. See also *Zeitschr. für Völkerr. u. Bundesstaatsrecht*, vol. 3, 72, 73.

Another reservation by Peru, in which Uruguay joined, sought to protect the so-called Calvo clause from possible infringement. The reservation reads :

“That the principles adopted in this proposition cannot be applied to claims or differences arising from contracts between the government of one country and foreign subjects, when it has been expressly stipulated that the claims or differences must be submitted to the judges and tribunals of the contracting country.”

The general futility of this clause in so far as it seeks to attain the exclusive jurisdiction of local courts and the avoidance of diplomatic interposition, has been demonstrated by international practice.

It will be seen that this Hague convention for the limitation of the use of force in the collection of contractual debts, popularly known as the Porter proposition, is at once narrower and wider in scope than the Drago doctrine. It is *narrower* inasmuch as it recognizes the ultimate legality of the use of force. As a definite check upon the use of force in first instance, and an important extension of the principle of international arbitration, it is to be welcomed, for pacific blockades, threats of hostilities, and rumors of warlike preparations, have a most disturbing effect on international commerce, and as General Porter showed, the disposition of neutral states to refuse to recognize pacific blockade leads to the more effective blockade of actual war, and as Mr. Roosevelt on a number of occasions has stated, the seizure of custom houses easily leads to a more permanent occupation of territory.

Moreover, the interruption of the commerce of the debtor nation diminishes its means and opportunities to pay the very debts for which the hostilities are undertaken and acts unfairly toward creditors of other nations. Many of these difficulties will now be avoided.



The Porter proposition is *wider* in scope than the Drago doctrine in that its provisions apply to all contractual debts, whereas Dr. Drago confined his policy to claims arising out of the non-payment of public loans. Nevertheless, doubt has been raised, both in the sub-committee of the conference and since then, as to the meaning of "contractual debts."<sup>102</sup>

Without entering into the various interpretations to which the term is subject, it seems clear that it does include public loans.

There is a class of cases, however, on the "contractual" nature of which there may be some doubt. When a contract has been concluded between a government and an individual for the carrying on of some public work, it has happened that a subsequent act of the legislature, acting not as a business fiscus but as a sovereign, diminishes the contractor's rights under the contract. National courts, as, for example, the United States Court of Claims, have held that the two functions which the government possesses as a fiscus and as a sovereign are distinct, and that the United States when sued in the one character cannot be made liable for acts done in the other:

"Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."<sup>103</sup>

The question arises whether these distinctions of national law which exclude the case mentioned from the category of

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<sup>102</sup> A full discussion of these doubts and possible interpretations is contained in Moulin, *op. cit.*, 308-320. See also article by G. W. Scott, *supra*, 90-93.

<sup>103</sup> Deming *v.* United States, 1 Ct. Cl. (1865), 190-191; Jones and Brown *v.* United States, 1 Ct. Cl. (1865), 384-399; Wilson *v.* United States, 11 Ct. Cl. (1875), 513-522. French courts have held the government liable for breach of contract by an act of legislation.

contractual debts will be maintained by the international forum in the interpretation of the term "contractual debts." We have seen that foreign offices in dealing with the Latin-American Republics have considered it as a violation of the contract, and an arbitrary measure, thus to reduce the contractor's rights by a subsequent legislative act. It seems reasonable to assume that this will be the interpretation of the term "contractual debt" by an international court.

Bond cases have come before international tribunals on several occasions. Very little light is thrown upon the subject by the results of these arbitrations, except as by their dicta the commissions express the opinion that governments have the *right* to press the claims of bondholders of a foreign debt, though they generally admit that in practice such claims are not diplomatically presented. As a general rule, however, jurisdiction has been declined—usually for the reason that governments are not in the habit of presenting such claims diplomatically and because of the unwillingness of commissions to assume that they were intended to exercise jurisdiction in the absence of express words in the protocol.<sup>104</sup> It has been so held even where the protocol provided for the settlement of "all claims."<sup>105</sup> This last decision, rendered by Sir Frederick Bruce, Umpire, was severely criticised by Mr. Commissioner Little in the Aspinwall case before the United States-Venezuelan commission of December 5, 1885. He held, with Mr. Findlay (Andrade dissenting), that the inclusive term "all claims" embraced bond claims. This case constitutes one important exception, prior to the

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<sup>104</sup> Overdue Mexican coupons, *Du Pont de Nemours (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.*, 3616. Opinion by Wadsworth. Zamacóna concurred. See dictum of Thornton, Umpire, in *Widman (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.*, 3467.

<sup>105</sup> Colombian Bond cases, *Riggs, Oliver, Fisher (U. S.) v. Colombia* (February 10, 1864), *Moore's Arb.*, 3612-3616.



Venezuelan Arbitration of 1903, to the general rule that jurisdiction over bond claims is not exercised by international commissions.<sup>106</sup>

Before the Venezuelan commissions, sitting at Caracas, four bond claims were presented, with various decisions. In the case of the *Comp. Générales des Eaux de Caracas* (Belgium),<sup>107</sup> Venezuelan bonds payable to bearer had been issued to the corporation for certain public works. From the decision it would seem that the general rule of non-enforcement of bond claims may be held not applicable where the bonds are issued in payment of property rights transferred to the government. Although many of the stockholders were not Belgians, an award was made with the peculiar provision that the money should be deposited in a Belgian bank and the bonds paid on being turned in. The production of the bonds naturally was made a necessary condition for the making of an award, so where, in the case of *Ballistini* (France),<sup>108</sup> the original bonds were not produced,

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<sup>106</sup> Venezuelan Bond cases, *Aspinwall, Executor of G. G. Howland et al. (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.*, 3616-3641. This claim was dismissed by the mixed commission under the convention of April 25, 1866. The findings of this commission were reopened because of the alleged fraud of the arbitrators. Under a strict construction of the protocol, *Bates, Umpire*, dismissed the Texas Bond cases before the British-U. S. Commission of Feb. 8, 1853, *Moore's Arb.*, 3594. One reason was that they had not been treated by Great Britain as a subject for diplomatic interposition. The decision is criticised by Westlake, vol. 1, 77-78, citing Dana in *Dana's Wheaton*, § 30, n. 18. Jurisdiction was exercised by the Mexican commission of 1868 over a stolen bond, *Keller (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.*, 3065, on the ground of fraudulent destruction of specific property having a definite value and certain assurances by the government. See also *Eldredge (U. S.) v. Peru*, Jan. 12, 1863, *Moore's Arb.*, 3462. The failure to fulfill the obligations of a bond issued for supplies was held not an "injury to property" by the U. S.-Mexican Commission of 1868 (*Manasse case*, *Moore's Arb.*, 3463), although the failure to pay for supplies furnished under contract had been so construed.

<sup>107</sup> *Comp. Générale des Eaux de Caracas (Belgium) v. Venezuela*, March 7, 1903, *Ralston I*, 271-290.

<sup>108</sup> *Ballistini (France) v. Venezuela*, Feb. 27, 1903, *Ralston I*, 503-506.

the claim was dismissed, Paul, Commissioner, in a dictum giving expression to the usual rule of the non-enforcement of bond claims before international commissions. In the case of *Boccardo (Italy)*,<sup>109</sup> where national bonds were delivered to claimant in payment for articles furnished and were never transferred by him, judgment was rendered on the authority of the *Aspinwall* case before the Venezuelan Commission of 1885. The fourth case, *Jarvis (U. S.)*,<sup>110</sup> was dismissed because the service and the supplies for which the bonds were issued (by a temporary dictator of Venezuela) were furnished to an unsuccessful revolution, which had not been recognized by the government of the United States, and hence presumably they were not valid obligations of Venezuela.

The United States, in its endeavor to be consistent with the maintenance of the Monroe Doctrine and with the declaration of President Roosevelt that that doctrine could not be used by any nation of this continent to shield it from the consequences of its own misdeeds, has at times been placed in the most delicate position when foreign nations have attempted to seek redress for the alleged violation of international rights. So in the settlement of numerous difficulties between European nations and Latin-American states arising out of pecuniary claims the United States has had an active interest. Especially where the occupation of American territory seemed imminent, the United States, by virtue of its responsibilities under the Monroe Doctrine, has felt called upon to undertake what may be called friendly inter-

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<sup>109</sup> *Boccardo (Italy) v. Venezuela*, Feb. 13, 1903, cited in note to *Ralston I*, 505 (not reported). See, however, the brief statement given by Mr. Ralston in his address before the International Law Association, 24th Report, 193-194.

<sup>110</sup> *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston I*, 145-151.



vention to prevent such occupation and yet satisfy the creditor nations.

President Roosevelt, in his message to Congress of Dec. 5, 1905, stated these embarrassing conditions, pointing out at the same time the method by which relief from this critical situation could be most equitably and practically secured. In his message he said :

“Our own government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not, and in consequence we are liable at any time to be brought face to face with disagreeable alternatives. On the one hand, this country would certainly decline to go to war to prevent a foreign government from collecting a just debt; on the other hand, it is very inadvisable to permit any foreign power to take possession, even temporarily, of the custom-houses of an American Republic in order to enforce the payment of its obligations, for such temporary occupation might turn into a permanent occupation. The only escape from these alternatives may at any time be that we must ourselves undertake to bring about some arrangement by which so much as possible of a just obligation shall be paid. It is far better that this country should put through such an arrangement rather than allow any foreign country to undertake it. To do so insures the defaulting republic from having to pay debts of an improper character under duress, while it also insures honest creditors of the republic from being passed by in the interest of dishonest or grasping creditors.”<sup>111</sup>

This method of administering the finances of bankrupt and unstable governments has in fact been applied in the Dominican Republic. In 1905 it was effective in restraining the forcible attempt of Germany, Spain and Italy to secure

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<sup>111</sup> For. Rel., 1905, H. Doc. 1, 59th Cong., 1st Sess., 34-35.

payment of arrears of interest and pledged revenues to their subject creditors. International practice seems to have given a sanction to this form of intervention. It might be called benevolent intervention in the interests of the debtor state and of its creditors, and however the paternal control of the temporary guardian may hurt the pride of the citizens of the bankrupt nation, the advantages resulting to world peace exceed by far such minor disadvantages as the disapproval of a few patriotic nationals.<sup>111a</sup> Nevertheless, in the absence of an international forum, it does not seem apparent how grossly exaggerated claims against these states can be avoided, for presumably the financial administration looks only to the payment of the current expenses and of the national debts and makes no provision for the judicial examination of the legitimacy of the latter. The unratified treaties of 1911 between the United States, Honduras and Nicaragua and the proposed "protectorate" treaty with Nicaragua, all of which were invited by these small republics, indicate a necessary policy of this government, whether by temporary receivership or supplementary administrative control, to secure the financial rehabilitation of the weaker states of Latin-America, and thus reassure foreign creditors and maintain domestic peace and prosperity on terms most favorable to Latin-America.<sup>112</sup>

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<sup>111a</sup> This Latin-American disapproval of the policy of the United States as evidenced in the unratified treaties of 1911 with Honduras and Nicaragua is expressed in a series of pamphlets: *United States and Latin America, Dollar Diplomacy*, by Juan Leets, New Orleans, 1912; *Nicaraguan Affairs*, San José, 1912; the *Morgan-Honduras Loan*, 3 parts, New Orleans, 1911-12.

<sup>112</sup> European countries have adopted practices of various kinds to assure the successful operation of a loan contract concluded between a foreign nation and their subjects. Thus Great Britain has provided in such cases for the selection of a British supervisor of the loan and the government "takes cognizance" of the contract. In the Dominican and



*Conclusion.*

The Porter proposition is by no means a complete remedy for existing evils, except in so far as it protects a debtor state from the *immediate* use of force. It still permits of much injustice to the debtor nation, inasmuch as claims are still presented on *ex parte* evidence without a judicial examination of the merits of the case. Experience has shown that claims are generally greatly exaggerated. Again, the creditor's national government is not required to arbitrate. The failure to make or accept the offer of arbitration simply precludes the use of force in first instance, but not the use of other methods of oppression. Experience has shown that it is only against weak states that governments will interpose to secure the payment of contract debts. Moreover, there

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the unratified Honduras and Nicaraguan treaties, diplomatic protection is extended to the receiver or supervisor in the performance of his duties. See the treaties between the United States and Dominican Republic, Feb. 7, 1907, Honduras, Jan. 26, 1911, and Nicaragua, June 8, 1911. See also editorial comment on the treaties in *Amer. Journ. of Int. Law* (1911), 1046-1051. A discussion of the treaties by Sec'y of State Knox is contained in his speech before the New York State Bar Association (1912), 311-318. An elaborate explanation and justification of the policy of the United States in negotiating the treaties is to be found in President Roosevelt's message in connection with the customs revenues of the Dominican Republic, Confidential Executive, V, 58th Cong., 3rd Sess. See also speeches incident to the visit of Philander C. Knox to the countries of the Caribbean, Feb. 23 to April 17, 1912 (Washington, 1913, Ch. III and IV). France has apparently no objection to using its subjects' foreign loans to foster its commercial interests. Speech of M. Pichon, Minister of Foreign Affairs, in the Chamber of Deputies, Jan. 13, 1911. *Journal Officiel*, Jan. 14, 1911. Notwithstanding the disapproval of the present Administration of "dollar diplomacy"—an ill-defined and much-abused term—as evidenced in the withdrawal from the Chinese loan, the Administration has clearly indicated by the proposed so-called "protectorate" treaty with Nicaragua its necessary interest in the financial stability of the small Latin-American states. The recent threat of Great Britain to dispatch a warship to Guatemala to secure the payment of debts and the resulting appeal of Guatemala to the United States presents a familiar situation in our Latin-American relations. By reason of the Monroe Doctrine, we cannot avoid an active concern in the adjustment of these difficulties, and had better sanction a method of peaceful administrative supervision most conformable to the interests of all parties concerned.

is a question whether the debtor government can demand arbitration.<sup>113</sup> This should certainly be made possible.

On the other hand, the unpaid creditor has no individual right to bring about the adjustment of his claim. The action of his government in his behalf depends upon political considerations and is entirely a matter of expediency and policy. If his government for any reason declines to become interested in his case or to espouse his claim against the foreign government, the creditor is without a remedy. A legal right of the individual may therefore be sacrificed to the political exigencies of his government. With the constant growth of international contractual relations between individuals and foreign governments, the fulfillment and enforcement of legal obligations toward individuals should be divorced from political considerations. The difference in the practice of governments in the support of contract claims gives an unequal advantage to the nationals of some states and correspondingly embarrasses the governments whose policy or practice it is to decline diplomatic pressure in such cases.

These various defects of the system as it still exists, with its possibilities of injustice either to the debtor state or the unpaid creditor, or both, lend much weight to the proposal, advanced with greatest emphasis in Germany, that *an international court be created by international agreement for the adjustment of these essentially legal claims. The individual should be given the right to bring suit against the debtor nation before this international tribunal*, as has been done in the convention for the establishment of an international prize court and in the treaty of Washington for the establishment of a Central American Court of Arbitration. *The creditor*

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<sup>113</sup> O. Nippold in Ztschr. für internationales privat. u. öffentliches Recht, vol. 18, 260.



*will be assured of a hearing, the debtor state will be secured against the pressure of exorbitant claims accompanied by disagreeable diplomatic coercion, the government of the claimant will avoid what is always a potential germ of international difficulties and ill-will, with the incidental expense of pressing a diplomatic claim, and the peace of the world will be fostered by the removal of one great source of international conflict.* The details of the organization and operation of this international court may be left to the delegates of the Third Hague Peace Conference, who may profitably examine the proposals of several learned Germans.<sup>114</sup> The prospect and opportunity for thus advancing the cause of international justice, toward which goal the Porter proposition makes only a slight forward step, must command universal support.

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<sup>114</sup> See the Denkschrift or memorial of the Altesten der Kaufmannschaft von Berlin to the Imperial Chancellor Sept. 30, 1910, reprinted in Niemeyer's Zeitschrift für internationales Recht, vol. 20, 594-599, and the Denkschrift of May 20, 1912, summing up the whole matter, reprinted in Berliner Jahrbuch für Handel and Industrie, 497-514. See also the following works: Freund, G. S. Der Schutz der Gläubiger (Berlin, 1910), § 5, 43 *et seq.*; Wehberg, Hans, Ein internationaler Gerichtshof für Privatklagen (Berlin, 1911), in which plans for the organization and operation of an international tribunal are carefully worked out. See also Wehberg's article, Die Durchsetzung von Privatanprüchen gegen Schuldnerstaaten, in Jahrbuch f. d. int. Rechtsverkehr, 1912-13, 391-402, and an article in Deutsche Wirtschafts-Zeitung, 1912, 704-710, Zur Errichtung eines internationalen Schiedsgerichtes für Streitigkeiten zwischen Privatpersonen und ausländischen Staaten. Fischer, Otto, Die Verfolgung vermögensrechtlicher Ansprüche gegen ausländische Staaten (Leipzig, 1912) and references to the proposals of others mentioned on pp. 15-16. See also a further note by Fischer in Ztschr. f. deutschen Zivilprozess, vol. 43, 282-284, and works already cited, Meili, Staatsbankrott, etc., 41, 50, 58, 59 and 63, and Pflug, 58-70.





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